(4)

No. 06-313

IN THE

Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

WILLIAM WEAVER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

BARRY LATZER
John Jay College of Criminal Justice, CUNY
445 W. 59th Street
New York, NY 10019
(212) 237-8192

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

(Intentionally left blank)

QUESTIONS PRESENTED

Did the Eighth Circuit Court of Appeals exceed its authority under AEDPA when it affirmed the issuance of a writ of habeas corpus for prosecutorial misconduct issues that have never been the subject of a holding by the Supreme Court of the United States?

(Intentionally left blank)

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 5

I

The Supreme Court of Missouri was entitled to deference under AEDPA when it decided summarily, but on the merits, that remarks by the prosecutor during the sentencing phase of a capital trial were permissible 7

II

The Eighth Circuit Court of Appeals exceeded its authority under AEDPA when it affirmed the issuance of a writ of habeas corpus for prosecutorial argument issues that are neither materially indistinguishable from a Supreme Court precedent, governed by a specific rule in Supreme Court precedent, nor an obvious and egregious violation of general principle 14

Conclusion 27

Appendix

TABLE OF AUTHORITIES

Cases

Brooks v. Kemp, 762 F. 2d 1383 (CA11 1985) 23, 26

Brown v. Luebbers, 371 F. 3d 458 (CA8 2004) 10

Caldwell v. Mississippi, 472 U. S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) 17

Canaan v. McBride, 395 F. 3d 376 (CA7 2005) 10

Carey v. Musladin, 549 U. S. __, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) 4, 5, 7, 14, 15, 16, 23

Clark v. Commonwealth, 833 S. W. 2d 793 (Ky. 1991) 26

Clemons v. Mississippi, 494 U. S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990) 11

Collins v. Francis, 728 F. 2d 1322 (CA11 1984) 25

Copeland v. Washington, 232 F. 3d 969 (CA8 2000) 17

Darden v. Wainwright, 477 U. S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) 17, 18, 19

Donnelly v. DeChristoforo, 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) 17, 19, 20, 21, 25

Edwards v. State, 737 So. 2d 275 (Miss. 1999) 25

Estelle v. Williams, 425 U. S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) 15

Fortini v. Murphy, 257 F. 3d 39 (CA1 2001) 10

Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) 20

Hogan v. Gibson, 197 F. 3d 1297 (CA10 1999) 10

Holbrook v. Flynn, 475 U. S. 560, 106 S. Ct. 1340,
89 L. Ed. 2d 525 (1986) 15, 16

Hope v. Pelzer, 536 U. S. 720, 122 S. Ct. 2508,
153 L. Ed. 2d 666 (2002) 14

James v. Bowersox, 187 F. 3d 866 (CA8 1999) 10

Lockyer v. Andrade, 538 U. S. 63, 123 S. Ct. 1166,
155 L. Ed. 2d 144 (2003) 14, 15

Mancuso v. Herbert, 166 F. 3d 97 (CA2 1999) 9

Muth v. Frank, 412 F. 3d 808 (CA7 2005) 10

Newlon v. Armontrout, 885 F. 2d 1328
(CA8 1989) 25, 26

Romano v. Oklahoma, 512 U. S. 1, 114 S. Ct. 2004,
129 L. Ed. 2d 1 (1994) 17, 19, 21, 22

Roper v. Weaver, 127 S. Ct. 763, 166 L. Ed. 2d 590
(2006) 4

Ryan v. Miller, 303 F. 3d 231 (CA2 2002) 13

Sawyer v. Smith, 497 U. S. 227, 110 S. Ct. 2822,
111 L. Ed. 2d 193 (1990) 21

Shurn v. Delo, 177 F. 3d 662 (CA8 1999) 27

Slack v. McDaniel, 529 U. S. 473, 120 S. Ct. 1595,
146 L. Ed. 2d 542 (2000) 9

State v. Armbruster, 641 S. W. 2d 763 (Mo. 1982) 11

State v. Irick, 762 S. W. 2d 121 (Tenn. 1988) 25

State v. Knighton, 436 So. 2d 1141 (La. 1983) 26

State v. Rose, 548 A. 2d 1058 (N.J. 1988) 25

State v. Tyler, 50 Ohio St. 3d 24, 553 N. E. 2d 576 (1990) 24

State v. Weaver, 912 S. W. 2d 499 (Mo. 1995) 2, 3, 8, 11, 12, 13

Van Tran v. Lindsey, 212 F. 3d 1143 (CA9 2000) 9

Weaver v. Bowersox, 241 F. 3d 1024 (CA8 2001) 4, 9

Weaver v. Bowersox, 438 F. 3d 832 (CA8 2006) ... Passim

Weaver v. Bowersox, No. 4:96-CV-2220-CAS (ED Mo., Aug. 9, 1999) 3

Weaver v. Bowersox, No. 4:96-CV-2220-CAS (ED Mo., May 7, 2003) 4, 8

Weaver v. Missouri, 519 U. S. 856, 117 S. Ct. 153, 136 L. Ed. 2d 98 (1996) 3

Williams v. Taylor, 529 U. S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) 6, 7, 14, 16

Witter v. State, 112 Nev. 908, 921 P. 2d 886 (1996) 25

Woodford v. Garceau, 538 U. S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003) 9

Woodson v. North Carolina, 428 U. S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) 18

Yarborough v. Alvarado, 541 U. S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) 15

United States Statute

28 U. S. C. § 2254(d)(1) 4, 5, 9

Secondary Authorities

Committee Report and Proposal from the Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, reprinted in 135 Cong. Rec. 24,694 (1989) 6

IN THE

Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

WILLIAM WEAVER,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case exemplifies an unfortunate tendency of federal courts to skirt the restrictions imposed on them by Congress in the Antiterrorism and Effective Death Penalty Act of 1996

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

(AEDPA). In the interest of comity, respect for state court processes, especially the processes that affect the administration of justice, and finality in capital cases, Congress restricted the authority of federal courts to issue the writ of habeas corpus to those state court decisions that are "contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

In the face of this limitation, federal courts are not free to issue the writ to correct every perceived state court error in the interpretation of federal law. Rather, they may only issue the writ in the face of decisions that are patently incompatible with United States Supreme Court case law. It is revealing that the Eighth Circuit Court of Appeals, in this very case, redacted from its recitation of the text of 28 U. S. C. § 2254(d)(1) the words "as determined by the Supreme Court of the United States."

This case presents another opportunity for this Court to give effect to Congress's limitation on the lower federal courts. It is apparent that the temptation to overstep AEDPA's boundaries simply is too great. This Court must, therefore, once again reaffirm the necessity of deference to the state judiciary. This deference is essential to the efficient and reliable determination of guilt and the swift execution of punishment that serves as the principal goal of the CJLF.

SUMMARY OF FACTS AND CASE

Before July 1987, a federal drug prosecution began against Daryl Shurn's brothers, Charles and Larry Shurn, in which Charles Taylor was to be a key witness. Taylor had worked for the Shurns and held some of the Shurns' drug houses in his name. *State* v. *Weaver*, 912 S. W. 2d 499, 507 (Mo. 1995).

On July 6, 1987, William Weaver and Daryl Shurn arrived at Taylor's home to force Taylor to sign over the Shurns' drug properties. After Taylor had signed the paperwork, Weaver

was supposed to kill Taylor. However, Taylor unexpectedly pulled a gun and escaped. Weaver and Shurn gave chase and fired several shots at Taylor. They followed him to a wooded area where Taylor fell from his wounds. Weaver and Shurn went back to their automobile, then Weaver returned to the wooded area and shot Taylor again. Taylor died from several gunshot wounds to the head. *Ibid.*

> "Weaver and Shurn drove away from the murder scene at a high rate of speed. Witnesses at the scene immediately reported the incident to the police, giving a detailed description of the vehicle. Shortly thereafter, police spotted the Shurn vehicle and gave chase. Following a collision during rush hour traffic on Interstate 70, Weaver and Shurn fled on foot. Shurn was captured at the scene, but Weaver ran off toward [an] apartment complex adjacent to the highway." *Id.*, at 507-508.

A police officer found Weaver, who was sweating profusely, running shoeless on a concrete street. Weaver claimed he was jogging, although he was many miles from home. He also said he was lost. He was placed under arrest and returned to the scene of the accident where one of the original pursuing police officers positively identified him. *Id.*, at 508.

At trial, the jury found Weaver guilty of first-degree murder and recommended a sentence of death. Weaver filed a motion for postconviction relief under Missouri Supreme Court Rule 29.15. After an evidentiary hearing, the court denied the motion. Weaver pursued a consolidated appeal to the Supreme Court of Missouri. *Id.*, at 507. That court affirmed his conviction and sentence and affirmed the denial of postconviction relief. *Ibid.* This Court denied certiorari. *Weaver* v. *Missouri*, 519 U. S. 856 (1996).

Weaver then sought federal habeas corpus relief under 28 U. S. C. § 2254. The United States District Court for the Eastern District of Missouri granted the petition and set aside the conviction and sentence. *Weaver* v. *Bowersox*, No. 4:96-

CV-2220-CAS (ED Mo., Aug. 9, 1999). The United States Court of Appeals for the Eighth Circuit reversed. *Weaver* v. *Bowersox*, 241 F. 3d 1024 (CA8 2001). On remand, the district court granted relief as to the penalty phase only on the ground that Weaver's due process rights were violated by the prosecutor's penalty phase closing argument. *Weaver* v. *Bowersox*, No. 4:96-CV-2220-CAS (ED Mo., May 7, 2003). The Court of Appeals affirmed the district court's judgment in a 2-1 decision. *Weaver* v. *Bowersox*, 438 F. 3d 832 (CA8 2006). On May 31, 2006, the Court of Appeals denied a petition for rehearing. That court also denied, in a 5-5 decision, a petition for rehearing en banc. This Court granted the state's petition for writ of certiorari on December 7, 2006, *Roper* v. *Weaver*, 127 S. Ct. 763, 166 L. Ed. 2d 590 (2006), and denied the defendant's cross-petition on December 11. *Weaver* v. *Roper*, No. 06-7089.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighth Circuit affirmed the issuance of a writ of habeas corpus in a case in which that court conceded that AEDPA's limitations apply—and then promptly ignored them. As we argue—and the Eighth Circuit acknowledged—although the Missouri Supreme Court addressed Weaver's claims "in a conclusory fashion," that review was "sufficient to bring the case under AEDPA." *Weaver* v. *Bowersox*, 438 F. 3d 832, 838 (CA8 2006).

Once AEDPA applies, as that selfsame statute makes clear, the writ of habeas corpus may *not* issue unless that state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1).

As this Court recently held in *Carey* v. *Musladin*, 549 U. S. __, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), the words "as determined by the Supreme Court of the United States" refer to

United States Supreme Court *holdings* on the relevant issue. *Id.*, 127 S. Ct., at 653, 166 L. Ed. 2d, at 487. The Eighth Circuit did not comply with this requirement, relying instead on one of its own decisions. That decision in turn referenced four rulings of this Court, which, though concerned with allegedly improper conduct by prosecutors, nevertheless do not provide clearly established law applicable to *Weaver*. A close examination of these four cases reveals that they are not similar enough or specific enough to qualify as controlling, clearly established federal law. This conclusion is given additional support by an examination of analogous lower federal and state court decisions. That case law strongly suggests that there is no clear guidance from this Court on these particular issues.

Since the state court ruling was not incompatible with clearly established federal law, as determined by this Court, the Court of Appeals exceeded its authority under AEDPA when it approved the issuance of the writ of habeas corpus.

ARGUMENT

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That Act placed new restrictions on the authority of federal courts to grant writs of habeas corpus to state prisoners. The relevant provision, 28 U. S. C. § 2254(d)(1), prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

By its terms, AEDPA limits the issuance of federal habeas writs to a subset of contested state court interpretations of federal law. Erroneous interpretations that are not contrary to Supreme Court rulings, and are not unreasonable applications thereof, are beyond the reach of federal habeas courts. It is clear that Congress sought a compromise between the need for

uniformity of federal law and the desire for respect for state court decisions involving the administration of criminal justice, a field in which state courts play the predominant role. If this compromise is to be maintained, and the will of Congress realized, it is imperative that AEDPA's strictures on federal habeas courts be given full and generous effect.

Death penalty cases provide an additional reason for preserving and perpetuating the AEDPA compromise—the interest in finality. Congress was well aware, as the title of the Act indicates, that capital cases were being delayed to the point that public confidence in the criminal justice system was jeopardized. Repeated and protracted habeas corpus litigation contributed significantly to this problem. Before AEDPA was approved, an influential committee headed by the late Supreme Court Justice Lewis F. Powell, Jr., declared:

> "[O]ur present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law. The resulting lack of finality undermines public confidence in our criminal justice system."[2]

By limiting habeas petitions to only the most clear-cut misapplications of federal law—those that are contrary to, or involve an unreasonable application of, clearly established federal law—Congress unambiguously evinced its intention to restrict the issuance of these petitions. As this Court has recognized, " 'Congress wished to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law.' " *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000), quoting *id.*, at 386 (opinion of Stevens, J.).

---

2. Committee Report and Proposal from the Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, reprinted at 135 Cong. Rec. 24,694 (1989).

Earlier this term, in *Carey* v. *Musladin*, 549 U. S. __, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), this Court recognized that the § 2254(d)(1) restrictions permit the granting of a writ only when the state court has misapplied United States Supreme Court *holdings* on the relevant issue, as opposed to dicta. See also *Williams*, 529 U. S., at 412. *Musladin* thereby acknowledged the need to establish a liberal interpretation of § 2254(d)(1)'s restrictions, and the concomitantly narrow ~~authority~~ of the habeas-issuing courts.

The instant case provides another opportunity for this Court to reaffirm that lower federal courts may not rely exclusively on their own cases to justify federal habeas petitions subject to § 2254(d)(1) limitations, but instead, must find that the state court ruling is incompatible with relevant United States Supreme Court holdings. This means only (1) a contrary decision on materially indistinguishable facts; (2) applying a standard contrary to a specific rule; or (3) a violation of a general principle which is so flagrant that it is obviously a violation. As we will demonstrate, Weaver's case is factually distinct from this Court's cases, none of which covers this situation, and the deference due state court decisions should have applied. As Eighth Circuit Judge Bowman said in dissent on this issue: "None of the Supreme Court cases cited in the Court's opinion touches on the distinct claims of prosecutorial misconduct on which the writ was granted." *Weaver* v. *Bowersox*, 438 F. 3d 832, 844 (CA8 2006) (Bowman, J., concurring in part and dissenting in part).

I. The Supreme Court of Missouri was entitled to deference under AEDPA when it decided summarily, but on the merits, that remarks by the prosecutor during the sentencing phase of a capital trial were permissible.

William Weaver was found guilty and sentenced to death for the murder of Charles Taylor, a killing stemming from a dispute among drug dealers and Taylor's expected testimony in

a federal drug prosecution. The conviction and sentence were affirmed by the Supreme Court of Missouri. See *State* v. *Weaver*, 912 S. W. 2d 499 (Mo. 1995). In the course of its 24-page opinion, the state supreme court decided, *inter alia*, that the state's closing arguments during the penalty phase of Weaver's capital trial were supported by the evidence and that the trial court did not abuse its discretion in permitting them. It also held that the prosecutor's arguments did not render the penalty phase of the trial fundamentally unfair. *Id.*, at 513-514. Subsequently, the United States District Court for the Eastern District of Missouri granted habeas relief on the grounds that three different penalty phase remarks of the prosecutor violated Weaver's Fourteenth Amendment Due Process rights. *Weaver* v. *Bowersox*, No. 4:96-CV-2220-CAS (ED Mo., May 7, 2003). The text of those arguments are set out in the Appendix.

The first of the prosecutor's comments, the "Innocence Remark," identified in the Eighth Circuit opinion as Claim 2E, concerned the prosecutor's concession that there is a possibility that defendant was innocent, followed by his implication that such a possibility is insufficient to serve as a legal bar to a death sentence. The second comment, the "Soldier Analogy," identified as 2F, compared the jurors to soldiers in wartime, suggesting that both were, at times, under a duty to kill. The third statement, 2M, the "Deterrence Statement," focused on the need to protect the community by deterring murderers like Weaver through the imposition of the death penalty.

A divided three-judge panel of the Eighth Circuit Court of Appeals affirmed the issuance of the writ, holding that while § 2254(d)(1) of AEDPA applied to the federal courts in Weaver's case, it did not bar relief because "there can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents." *Weaver* v. *Bowersox*, 438 F. 3d 832, 842 (CA8 2006).

We consider first whether AEDPA is applicable to this case. There are two issues: whether or not a pre-AEDPA filing

by Weaver affects the application of the statute, and whether or not the state court sufficiently considered the claims for them to be treated as "adjudicated on the merits" as that phrase is used in § 2254(d).

The filing issue presents no serious obstacle to the applicability of AEDPA. Weaver filed his petition for the writ of habeas corpus on November 12, 1996, which was after April 24, 1996, AEDPA's effective date. Although Weaver also had filed a pre-AEDPA habeas petition, that petition had been dismissed without prejudice for failure to exhaust state remedies. *Weaver* v. *Bowersox*, 241 F. 3d 1024, 1029 (CA8 2001). This Court has held that pre-AEDPA filings by an applicant do not preclude application of the statute. "[A]n application filed after AEDPA's effective date should be reviewed under AEDPA, even if other filings by that same applicant—such as, for example, a request for the appointment of counsel or a motion for a stay of execution—were presented to a federal court prior to AEDPA's effective date." *Woodford* v. *Garceau*, 538 U. S. 202, 207 (2003). AEDPA applies to an appeal filed after its effective date, even if the petition was filed in the district court before that date. See *Slack* v. *McDaniel*, 529 U. S. 473, 480-482 (2000). AEDPA is applicable to a petitioner's filing after the statute's effective date even if he also filed prior to that date, where the earlier petition was dismissed for failure to exhaust state remedies. See *Weaver* v. *Bowersox*, 241 F. 3d 1024 (CA8 2001); *Van Tran* v. *Lindsey*, 212 F. 3d 1143 (CA9 2000), overruled on other grounds, *Lockyer* v. *Andrade*, 538 U. S. 63, 71, 75 (2003); *Mancuso* v. *Herbert*, 166 F. 3d 97 (CA2 1999). Any other rule would invite an applicant to evade AEDPA simply by filing prematurely.

The adjudication-on-the-merits issue is a bit less straightforward. Section 2254(d) says: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was *adjudicated on the merits* in State court proceedings . . . ." (Emphasis added). Therefore, if a claim

was not "adjudicated on the merits" § 2254(d) is inapplicable. See *Canaan* v. *McBride*, 395 F. 3d 376, 382 (CA7 2005); *Fortini* v. *Murphy*, 257 F. 3d 39, 47 (CA1 2001); *Hogan* v. *Gibson*, 197 F. 3d 1297, 1306 (CA10 1999).

The Eighth Circuit correctly held that although the Missouri Supreme Court addressed Weaver's claims "in a conclusory fashion," that review was "sufficient to bring the case under AEDPA." *Weaver*, 438 F. 3d, at 838. The court cited *Brown* v. *Luebbers*, 371 F. 3d 458, 462 (CA8 2004) ("the 'summary nature' of the discussion of the federal constitutional question does not preclude application of the AEDPA standard"), *James* v. *Bowersox*, 187 F. 3d 866, 869 (CA8 1999) (the summary nature of a state court opinion does not affect the federal court's decision to apply the AEDPA standard), and *Muth* v. *Frank*, 412 F. 3d 808, 815 (CA7 2005) ("AEDPA's requirement that a petitioner's claim be adjudicated on the merits by a state court is not an entitlement to a well-articulated or even a correct decision by a state court. In fact, several circuits have held that a state court need not offer *any* reasons and summarily dispose of a petitioner's claim and that summary disposition would be an adjudication on the merits").

However, Circuit Judge Bye, concurring in the result, concluded that AEDPA is inapplicable because "the state court discusses and analyzes only three of the six" claims raised by Weaver and "ignored Weaver's most compelling constitutional claim." *Weaver*, 438 F. 3d, at 843 (Bye, J., concurring in the result).

The Supreme Court of Missouri addressed the relevant issues as follows. First, at the beginning of Part IV of the opinion, the court presented an overview of the defendant's prosecutorial misconduct claims.

> "Defendant argues that the state's closing arguments during both the guilt and penalty phases of the trial were erroneous and further that counsel was ineffective in failing to object to some of the improper arguments. A review of

> the record discloses that defense counsel objected vehemently to almost all the arguments complained of here and that several of the objections were sustained, followed by curative instructions to the jury. The trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted. *State* v. *Armbruster*, 641 S. W. 2d 763, 766 (Mo. 1982). Our review of the arguments discloses neither error in permitting the arguments nor ineffective assistance of counsel in failing to object." *Weaver*, 912 S. W. 2d, at 512.

The above-quoted statement of the state supreme court is, in and of itself, sufficient to constitute an adjudication on the merits of Weaver's prosecutorial misconduct claims. First, the court made clear that it was ruling on *all* of the prosecutorial argument claims. In a reference to the totality of defendant's claims, the court noted that defense counsel "objected vehemently to almost all the arguments complained of here." *Ibid.* In addition, the court's statement that it made a "review of the arguments" clearly referred to *all* of defendant's claims respecting allegedly improper statements by the prosecutor. *Ibid.* Contrary to Judge Bye's assertion, there is no requirement that the state court discuss and analyze each subclaim individually. Cf. *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990) (an appellate court may implicitly reject litigants' arguments by refusing to address them). A state court may collectively address the multiple components of a single legal claim, and, as long as it reaches the merits of the issue, each component should be considered adjudicated on the merits for the purposes of § 2254(d). Consequently, the state court's discussion of "the state's closing arguments during both the guilt and penalty phases of the trial," *Weaver*, 912 S. W. 2d, at 512, was sufficient to serve as adjudication on the merits of each prosecutorial misconduct claim.

Second, after reviewing in detail what it probably considered the most meritorious of defendant's prosecutorial misstate-

ment claims (Parts IV-A and IV-B of the opinion), the Missouri Supreme Court presented in Part IV-C of the opinion a separate analysis of the prosecutor's statements at the sentencing hearing.

> "Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support. The prosecutor argued that had Weaver not run out of bullets he would have shot the arresting officer. He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would have also shot that witness. Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial court abused its discretion in permitting the argument is without merit. The point is denied." *Weaver*, 912 S. W. 2d, at 514.

It is abundantly clear that the court was referring to all of these claims collectively, as it speaks of "a collection of allegedly improper arguments made by the state during the punishment phase," followed by its finding that "these arguments are reasonable." *Ibid.* Clearly, the court felt that each individual argument was reasonable. Therefore, each claim should be considered adjudicated on the merits.

Furthermore, it is not apparent that the state court actually failed to single out for review the subclaim that Judge Bye appears to have thought most compelling. Judge Bye identified prosecutor's statement 2M as the "War on Drugs" claim, and asserted that the Missouri court "ignored" it. *Weaver*, 438 F. 3d, at 843 (Bye, J., concurring in the result). However, that prosecutorial statement might just as convincingly be identified

as the "Deterrence Statement" because it refers four different times to the need for a death sentence in order to achieve general deterrence.[3] The Missouri Supreme Court explicitly approved of the deterrence argument: "Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable." *Weaver*, 912 S. W. 2d, at 514. It is plausible to consider this a reference to Claim 2M. Therefore, one cannot say with certainty that the Missouri Supreme Court "ignored" defendant's argument.

Ultimately, however, whether the state court explicitly resolved the 2M claim or decided it as part of a bloc of similar claims is of no moment insofar as AEDPA is concerned. If a state court, as the Missouri Supreme Court did, adjudicates a claim on the merits, then § 2254(d) is applicable. State courts are entitled to deference simply because they adjudicated the relevant claim on the merits, whether or not they "discussed or analyzed" the issue. There is neither a qualitative nor a quantitative test for state court opinions. See *Ryan* v. *Miller*, 303 F. 3d 231 (CA2 2002) (state court's failure to specifically address habeas applicant's Confrontation Clause challenge does not obviate deferential review where the court made a blanket statement that defendant's remaining contentions were either unpreserved for appellate review or without merit). "A state court need not analyze each individual claim or cite federal law in order to adjudicate a claim, so long as it states it is disposing of the claim on the merits, and it issues a judgment." *Id.*, at 246. The Eighth Circuit majority was right, and Judge Bye was in error.

---

3. Four statements of the prosecutor either expressly or impliedly refer to general deterrence, the theory that punishing offenders discourages crime by others. These remarks are identified as Claim 2M. See *Weaver*, 438 F. 3d, at 836-837. See Appendix, the paragraph on App. 1-App. 2, the paragraph on App. 2-App. 3, and the first and second full paragraphs on App. 3.

In sum, where a state court decides on the merits a bloc of similar claims—here, numerous allegedly improper prosecutorial arguments—without separately discussing each subclaim, it may be said to adjudicate each subclaim on the merits for § 2254(d) purposes.

II. The Eighth Circuit Court of Appeals exceeded its authority under AEDPA when it affirmed the issuance of a writ of habeas corpus for prosecutorial argument issues that are neither materially indistinguishable from a Supreme Court precedent, governed by a specific rule in Supreme Court precedent, nor an obvious and egregious violation of general principle.

In *Carey* v. *Musladin*, 549 U. S. __, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), this Court reiterated that the phrase "clearly established Federal law" in § 2254(d)(1), the Antiterrorism and Effective Death Penalty Act of 1996, " 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.' " *Id.*, 127 S. Ct., at 653, 166 L. Ed. 2d, at 487, quoting *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). Therefore, federal habeas relief was properly granted in Weaver's case only if the Missouri Supreme Court's decision was contrary to or involved an unreasonable application of this Court's applicable holdings.

Where the clearly established law is only a broad principle, it would take an extreme case for a state court decision to be an unreasonable application. In *Lockyer* v. *Andrade*, 538 U. S. 63, 72-73 (2003), the only clearly established law was that sentences cannot be grossly disproportionate. Given the vagueness and generality of this principle, it would provide a governing standard only in " 'exceedingly rare' and 'extreme' case[s]." *Id.*, at 73. None of this Court's modern habeas cases provide a real-life example of conduct so outrageous that it constitutes a clear violation of a general principle. In the related qualified immunity area, *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002)

notes that tying a prisoner to a hitching post all day, shirtless, in the Alabama sun is *arguably* such a violation. See also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Carey* v. *Musladin*, No. 05-785, pp. 7-8. Whatever one thinks of the prosecutor argument in the present case, it does not come remotely close to the kind of extreme misconduct that would violate clearly established law without a specific rule or precedent governing the situation.

The key question, then, is how specific or how factually similar must a ruling of this Court be to serve as an applicable holding? See *Lockyer*, 538 U. S., at 76; *Yarborough* v. *Alvarado*, 541 U. S. 652, 664-666 (2004). In *Musladin*, this Court found that none of its prior holdings required the state court to apply to the context in *Musladin* the legal test developed in a different context. Consequently, the state court's decision was held not contrary to or an unreasonable application of clearly established federal law.

Musladin involved a display of the victim's image on buttons worn by the murder victim's family during Musladin's trial. The state court held that this conduct did not deny the right to a fair trial. The Court of Appeals for the Ninth Circuit reversed the United States District Court and remanded for issuance of the writ of habeas corpus. See 127 S. Ct., at 651-652, 166 L. Ed. 2d, at 486-487. According to the Court of Appeals, this Court's decisions in *Estelle* v. *Williams*, 425 U. S. 501 (1976), and *Holbrook* v. *Flynn*, 475 U. S. 560 (1986), clearly established a rule of federal law—the test for inherent prejudice—applicable to Musladin's case.

In *Estelle*, this Court stated that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes," but held that defendant waived his rights by failing to object at trial. 425 U. S., at 512. In *Flynn*, this Court held that the presence of four uniformed state troopers immediately behind the defendant at trial was not so inherently prejudicial that it denied the defendant a fair trial. The *Flynn* Court

announced that the test is "whether an unacceptable risk is presented of impermissible factors coming into play." 475 U. S., at 570 (internal quotation marks deleted).

Since both *Estelle* and *Flynn* concerned displays during a criminal trial that arguably prejudiced the defendant, it was plausible to conclude, as the Ninth Circuit did, that the buttons displayed in *Musladin* implicated the *Flynn* test. Nonetheless, this Court distinguished *Estelle* and *Flynn* and held that no holding of this Court required application of their rules to the *Musladin* case. As this Court explained, *Estelle* and *Flynn* involved state-sponsored courtroom practices, not spectator conduct, and "the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence." 127 S. Ct., at 653, 266 L. Ed. 2d, at 488. Crucially, Justice Thomas, writing for this Court, added that "although the Court articulated the test for inherent prejudice that applies to state conduct in *Williams* and *Flynn*, we have never applied that test to spectators' conduct." *Id.*, 127 S. Ct., at 653-654, 166 L. Ed. 2d, at 488.

Thus, the message of *Musladin* is that where this Court has applied a legal test for a particular situation, then that Supreme Court decision should not be considered "clearly established Federal law" with respect to a different situation where a different standard may arguably be appropriate. In addition, where the facts of the habeas petitioner's case are "materially indistinguishable from a decision of this Court," *Williams*, 529 U. S., at 406, that Supreme Court precedent will constitute clearly established federal law for AEDPA's purposes. For the same reasons discussed below, the facts in Weaver's case are materially distinguishable from the relevant United States Supreme Court precedents.

In its *Weaver* ruling, the Eighth Circuit Court of Appeals—like the Ninth Circuit in *Musladin*—relied on its own case law to establish the existence of "clearly established Federal law." *Weaver*, 438 F. 3d, at 839, citing *Copeland* v. *Washington*, 232 F. 3d 969, 974 (CA8 2000). The relied-on

Eighth Circuit case, *Copeland* v. *Washington*, 232 F. 3d 969 (CA8 2000), in turn held that certain United States Supreme Court decisions on penalty phase as well as guilt phase closing arguments were sufficient to satisfy AEDPA's "clearly established Federal law" requirement. *Id.*, at 973-974. The decisions cited were *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), and *Romano* v. *Oklahoma*, 512 U. S. 1 (1994), for penalty phase issues, and *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), and *Darden* v. *Wainwright*, 477 U. S. 168 (1986), for guilt phase claims. It is true that all of these cases, like *Weaver*, concern allegedly improper conduct by prosecutors—but that is where the similarity ends.

Donnelly and *Darden* do not provide clearly established law applicable to *Weaver* because, unlike *Weaver*, they do not concern the sentencing stage of a death penalty case. Undoubtedly, the law and the issues arising out of the penalty phase of a capital case are significantly different from those associated with the guilt-determination phase. See *Caldwell*, 472 U. S., at 329 (applying the Eighth Amendment to prosecutorial remarks in the sentencing phase of a capital case because " 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination' "), quoting *California* v. *Ramos*, 463 U. S. 992, 998-999 (1983). The Eighth Circuit, in *Copeland*, acknowledged this difference, 232 F. 3d, at 974, n. 2, but suggested that the greater scrutiny required in the sentencing phase case provided additional support for issuance of the writ of habeas corpus. To the contrary, however, where AEDPA applies, the issuance of the writ turns not on the need for, in the Court of Appeals' words, "a more searching review," *ibid.*, but rather on the existence of clearly applicable United States Supreme Court precedent.

Darden does not provide that precedent. The relevant issue in *Darden*, as this Court put it, was whether "the prosecution's closing argument at the guilt-innocence stage of the trial rendered his conviction fundamentally unfair and deprived the

sentencing determination of the reliability that the Eighth Amendment requires." 477 U. S., at 178-179. The challenged remarks, as described by this Court, were found: (1) The prosecutor "place[d] some of the blame for the crime on the Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred." *Id.*, at 179-180. (2) "Some comments implied that the death penalty would be the only guarantee against a future similar act." *Id.*, at 180. (3) Other comments "incorporated the defense's use of the word 'animal.' " *Ibid.* (4) "Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case." *Ibid.*

First of all, none of these prosecutorial remarks is similar to the challenged comments in *Weaver*, *i.e.*, to the "Innocence Remark," the "Soldier Analogy," or the "Deterrence Statement." Consequently, the *Darden* holding would have afforded little guidance to the state court. Of course, the remarks need not be virtually identical for the Supreme Court precedent to provide clearly established law, but where they are so completely different that it will be difficult for a state court to be confident that its ruling is consistent with this Court's case law, AEDPA mandates deference to the state court's ruling.

Second, the primary question in *Darden*—whether the remarks "rendered his conviction fundamentally unfair," 477 U. S., at 178—is a very different question from that raised by *Weaver*, viz., whether the *sentence* was invalid. This is a crucial distinction. The factors that enter into the death sentencing decision are very different from those that affect the guilt or innocence determination. For instance, the jury's judgment about the "character and record of the individual offender," *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976), is relevant to sentence, but not usually to guilt. Moreover, the focus of the closing remarks at the sentencing, as opposed to the guilt phase, is apt to reflect this difference. Consequently, that which renders a *conviction* fundamentally unfair may not affect a *death sentence*, and vice versa.

Third, the other *Darden* issue—whether the prosecutor's remarks violated the *Caldwell* principle by depriving the sentencing determination of the reliability that the Eighth Amendment requires—implicates a distinctive legal theory, one involving the affirmative misleading of the jury regarding its role in the sentencing process. See *Romano*, 512 U. S., at 9 (holding that admission of evidence that a capital defendant already had been sentenced to death in another case did not violate the *Caldwell* principle). The *Darden* Court held that there was no *Caldwell* violation since "the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing." 477 U. S., at 183, n. 15. Thus, with respect to the *Caldwell* issue, both the facts and the legal theory of *Darden* differentiate it from *Weaver*. The *Caldwell* portion of the *Darden* decision is of no relevance to Weaver's due process claim respecting the prosecutor's penalty phase remarks.

In addition to its distinguishable facts and distinct context, *Darden* did not establish any specific rule relevant to this case because *Darden* held that there was no violation of due process in that case. The only standard stated is the very general *Donnelly* rule, see 477 U. S., at 181. A case holding that a certain set of facts does *not* violate a very general standard does little toward establishing a rule that other facts not before the Court would violate that standard.

In short, this Court's holding in *Darden* is materially distinguishable from Weaver's case, arose in a different context, and applied only a very general standard. It did not create any "clearly established Federal law" to which the state court decision could be contrary.

If *Darden* is far removed from *Weaver*, *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), another case relied on by the Eighth Circuit, is even more so. *Donnelly* involved

prosecutorial closing remarks in a pre-*Furman*[4] unitary capital trial in which the jury found the defendant guilty of first-degree murder and recommended against the death penalty. After defendant's jointly tried codefendant pleaded guilty, the prosecutor, in his summation, remarked to the jury, in reference to defendant and his counsel: "They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." *Id.*, at 640. In response, the trial judge later gave a curative instruction. The issue, as described by this Court, was whether the remark "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*, at 643. This Court held that, since the remark was ambiguous, was but one moment in an extended trial, and was followed by specific disapproving instructions, no due process violation occurred. *Id.*, at 645.

Donnelly is markedly different from *Weaver*. First, the remarks at issue are quite dissimilar. The *Donnelly* prosecutor imputed certain beliefs to the defendant and his attorney, which is a far cry from the "Innocence Remark," the "Soldier Analogy," or the "Deterrence Statement" in *Weaver*. Second, there was no separate sentencing phase in the *Donnelly* case, whereas Weaver had a bifurcated trial only the second stage of which is at issue. Third, the *Donnelly* issue concerned the unfairness of the conviction, not, as in *Weaver*, the sentence. Fourth, and finally, unlike *Weaver*, there was no death sentence in *Donnelly*, as defendant was sentenced to life imprisonment. All told, *Donnelly* cannot be considered clearly established federal law with respect to Weaver's very different case.

To support its clearly-established-federal-law contention the Eighth Circuit also cited *Caldwell* and *Romano* v. *Oklahoma*. We have already noted, above, the significant differences between a *Caldwell*-Eighth Amendment claim and a due

---

4. *Furman* v. *Georgia*, 408 U. S. 238 (1972).

process claim. This Court, in *Sawyer* v. *Smith*, 497 U. S. 227 (1990), stressed that very difference:

> "Rather than focusing on the prejudice to the defendant that must be shown to establish a *Donnelly* [due process] violation, our concern in *Caldwell* was with the 'unacceptable risk' that misleading remarks could affect the reliability of the sentence. . . . *Caldwell* must therefore be read as providing an additional measure of protection against error, beyond that afforded by *Donnelly*, in the special context of capital sentencing." *Id.*, at 244 (citation omitted).

A due process claim asks whether the alleged misconduct so infected the proceeding with unfairness as to make the result a denial of due process. See *Donnelly*, 416 U. S., at 643. *Caldwell* looks to a much different issue: whether the jury was "affirmatively misled regarding its role in the sentencing process." *Romano*, 512 U. S., at 9. Thus, the *Caldwell* line of cases, including, in part, *Romano*, cannot be considered clearly established federal law for Weaver's due process claims.

Romano addressed both *Caldwell* and due process issues. In *Romano*, the State sought to prove two aggravating circumstances (previous conviction of a violent felony and continuing threat to society) by evidence that defendant had previously been convicted of first-degree murder and sentenced to death. Romano argued that evidence of the prior death sentence deprived the sentencing determination of the reliability that the Eighth Amendment requires. This Court rejected the *Caldwell* claim on the grounds that the death sentence evidence was neither false nor pertinent to the jury's role in sentencing. *Romano*, 512 U. S., at 9.

Respecting Romano's due process claim, this Court, applying the analytical framework developed in *Donnelly*, asked "whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Id.*, at 12. The answer

was negative, primarily because the trial court's instructions "clearly and properly described the jurors' paramount role in determining petitioner's sentence, and they also explicitly limited the jurors' consideration of aggravating factors to the four which the State sought to prove." *Id.*, at 13. Moreover, even without the evidence of the prior death sentence, "the jury had sufficient evidence to justify its conclusion that these four aggravating circumstances existed." *Ibid.* Alternatively, this Court held that no due process violation occurred because "it is impossible to know how this evidence might have affected the jury. It seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so." *Id.*, at 14.

While *Romano* established that the Due Process Clause of the Fourteenth Amendment applies to the sentencing phase of capital trials, it did not establish that the same due process analysis applies to prosecutorial closing remarks in the sentencing hearing—the issue in *Weaver*. The *Romano* analysis would not have resolved the *Weaver* issue. Instructing the jury on its paramount role in determining petitioner's sentence, and explicitly limiting the jurors' consideration of aggravating factors to those which the State sought to prove, would not affect the prejudice to defendant, if any, caused by the Weaver prosecutor's comments. In short, because *Romano* simply is not a prosecutorial-closing-remarks case, its facts are so different from those of *Weaver* that it cannot be considered clearly established federal law for Weaver's due process claims.

The overall conclusion, therefore, is compelling: none of the four United States Supreme Court cases cited by the Eighth Circuit Court of Appeals—neither *Caldwell*, *Romano*, *Donnelly*, nor *Darden*—constitutes "clearly established Federal law" controlling with respect to Weaver's prosecutorial remarks claim. Consequently, the Eighth Circuit acted improperly when it declined to defer to the Supreme Court of Missouri and approved the issuance of the writ of habeas corpus.

This conclusion gains additional support from the division in the case law on the issues raised by Weaver's case. In *Carey* v. *Musladin*, 549 U. S. __, 127 S. Ct. 649, 654, 166 L. Ed. 2d 482, 489 (2006), this Court suggested that divergent treatment of the relevant claims by lower courts is an indicator of the lack of guidance from this Court, *i.e.*, the lack of United States Supreme Court holdings specific enough and factually similar enough to clearly establish a controlling rule. Such a divergence is evident with respect to the prosecutorial comment issues in *Weaver*.

The Eighth Circuit opinion in *Weaver* sorted the prosecutor's remarks into five categories:

> "(1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the "war on drugs"; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should 'kill [Weaver] now')." 438 F. 3d, at 840.

We examine some of the case law relevant to each of these categories.

(1) Although the Eighth Circuit, in *Weaver*, found that the soldier analogy "eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment," *ibid.*, the Eleventh Circuit expressed partial approval of similar remarks. See *Brooks* v. *Kemp*, 762 F. 2d 1383, 1412 (CA11 1985), vacated on other grounds, 478 U. S. 1016 (1986) (approving part of the argument: "the analogy of the death penalty to killing in a war was appropriate insofar as it implied that imposing death, while difficult, is at times sanctioned by the

state because of compelling reasons (national security or deterring crime)").

(2) The Eighth Circuit's *Weaver* decision found statements about the prosecutor's personal belief in the death penalty "inappropriate and contrary to a reasoned opinion by the jury." 438 F. 3d, at 841. By contrast, however, the Ohio Supreme Court endorsed the practice, noting that "it is difficult for prosecutors to argue vigorously for the death penalty without making what might arguably be statements of personal opinion." *State* v. *Tyler*, 50 Ohio St. 3d 24, 41, 553 N. E. 2d 576, 595 (1990).

(3) The Court of Appeals characterized what it called "Claim 2M" as a "war on drugs" argument, stating that the prosecutor urged the jury to impose the death penalty in order to "sustain a societal effort as part of the 'war on drugs.' " 438 F. 3d, at 840. With respect, this misrepresents the prosecutor's remarks. Four times within the relevant address to the jury the prosecutor either expressly or impliedly referred to general deterrence, the theory that punishing offenders discourages crime by others. See *supra*, at 13, n. 3. Not once did he suggest that Weaver should be executed solely because he was a drug dealer. And, although a few words taken out of context seem to suggest that the death penalty is needed to fight drug dealers,[5] the general thrust is that the death penalty is necessary to protect the community from drug dealers who commit murder, especially murder for hire. "[T]he message you want to send to the drug dealers, the dope peddlers *and the hit men they hire to do their dirty deeds* . . . has to be death for these types of people." *Id.*, at 837 (emphasis added). As then-Justice

---

5. For instance, the prosecutor said, "This case—I guess it's the one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case." 438 F. 3d, at 836.

Rehnquist, speaking for this Court, cautioned: "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U. S., at 647.

The courts are not in full agreement on the appropriateness of general deterrence arguments. Some disapprove. See *State* v. *Rose*, 548 A. 2d 1058, 1092 (N.J. 1988); *State* v. *Irick*, 762 S. W. 2d 121 (Tenn. 1988) (improper but not reversible error). Others have sanctioned such comments. See *Collins* v. *Francis*, 728 F. 2d 1322, 1339-1340 (CA11 1984); *Edwards* v. *State*, 737 So. 2d 275, 300 (Miss. 1999); *Witter* v. *State*, 112 Nev. 908, 924, 921 P. 2d 886, 897 (1996), overruled on other grounds, *Fore* v. *State*, 118 Nev. 330, 45 P. 3d 404 (2002).

(4) This category refers to one passing remark by the prosecutor which is here set out in full: "I'm the Prosecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't." *Weaver*, 438 F. 3d, at 837. This was followed immediately by an objection from Weaver's counsel. The trial court sustained the objection and instructed the jury to disregard the statement.

Although courts are divided on the propriety of comments invoking the prestige of a prosecutor's office, some of the cases are distinguishable from *Weaver*, where the prosecutor merely stated that he was the "top law enforcement officer" with responsibility for selecting cases for capital prosecution. This correct factual statement is different from assertions that imply that the prosecutor personally approves the death penalty in the case, or that there are facts outside the evidence that make the case especially appropriate for the death penalty.

Disapproving but distinguishable cases include *Newlon* v. *Armontrout*, 885 F. 2d 1328 (CA8 1989) (the prosecutor's emphasis on his authority as the "top law enforcement officer

of the County" combined with other remarks infected the penalty proceeding with an unfairness that violated due process), *Brooks*, 762 F. 2d, at 1410 (discussion of the prosecutor's practice of seeking death only in a few cases during the past years was improper), and *Clark* v. *Commonwealth*, 833 S. W. 2d 793 (Ky. 1991) (prosecutor erroneously minimized the responsibility of the jury for imposing the death sentence by arguing that the prosecutor's office infrequently seeks the death penalty and that this was "an extraordinary case as envisioned by our Legislature" for the death penalty). But see *State* v. *Knighton*, 436 So. 2d 1141, 1154 (La. 1983) (the prosecutor's statement that "[i]t's not every case the District Attorney's office seeks the death penalty" did not inflame the jury and deprive defendant of a fair trial).

(5) This final category consists of arguments characterized by the Eighth Circuit as "designed to appeal to the emotions of the jury" and "culminating in a statement that the jury should 'kill [Weaver] now.' " *Weaver*, 438 F. 3d, at 840. The prosecutor's actual words were as follows:

> "Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well, it was right to kill then and it's right to kill him now." *Id.*, at 836.

We do not agree that this argument is designed solely to appeal to the emotions of the jury as it contains a reasoned argument comparing a decision to impose a death sentence to another legally justified killing, viz., killing in self-defense. Nevertheless, outside of a few Missouri cases, we could find no case law supporting or disapproving such an argument. See *Newlon* v. *Armontrout*, 885 F. 2d 1328 (CA8 1985) (where the prosecutor expressed his personal belief in the propriety of the death penalty, emphasized his position of authority in the

county as prosecutor, attempted to associate the defendant with several well-known mass murderers, appealed to the jurors' personal fears and emotions, and asked the jurors to "kill" the defendant, the penalty phase of the trial was, in the totality of the circumstances, fundamentally unfair); *Shurn* v. *Delo*, 177 F. 3d 662 (CA8 1999) (same result where the same prosecutor gave essentially the same argument that led to reversal of the death sentence in *Newlon*).

In conclusion, the case law either is split or inconclusive on the type of prosecutorial arguments made in *Weaver*. This strongly suggests that there is no clearly established law from this Court on these particular issues. Such evidence, along with a close examination of the cases from this Court actually cited by the Eighth Circuit, leads to the conclusion that the Court of Appeals relied on its own case law along with speculative inferences about the appropriate legal standards drawn from related United States Supreme Court cases. This may be sound legal reasoning in a direct review case. But it is not what Congress meant when it forbade the granting of a writ of habeas corpus except for state court decisions that are "contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be reversed.

January, 2007

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(Intentionally left blank)

APPENDIX

APPENDIX

The Court of Appeals for the Eighth Circuit quoted three statements of the prosecutor at issue in this case. *Weaver* v. *Bowersox*, 438 F. 3d 832, 835-837 (CA8 2006). These statements, reproduced below, were identified by the parties as Claim 2E, Claim 2F, and Claim 2M.

Claim 2E:

So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty.

Claim 2F:

Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it? I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in the pile of goo that a moment before was your best friend's face, you'll know what to do.

Claim 2M:

It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent

society. You have to give a message here. You have to tell the Williams Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.

Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well, it was right to kill then and it's right to kill him now.

. . . .

This case—I guess it's the one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case. When it comes time after [defense counsel] talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business.

. . . .

And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced you're

guilty, we're going to give you life in prison? That's not the right message.

. . . .

The message has to be death for these types of people. That's the only message they are going to understand. The one thing you've got to get into your head, this is far more important than William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and the murderers in the world. That's the message you have to send. It doesn't just pertain to William Weaver. It pertains to all of us, the community. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that.

. . . .

You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do.

. . . .

It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't.